CHOO YOKE CHOY

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
ANUAR ZAINAL ABIDIN J
[SUPREME COURT CRIMINAL APPEAL NO. 05-136 OF 1989]
17 SEPTEMBER 1992

CRIMINAL PROCEDURE: *Dangerous drugs - Presumption of possession and knowledge - Care and custody of drugs - Drugs recovered from two different locations in house - Circumstances which led to recovery of drugs at two different locations not considered by trial Judge.*

CRIMINAL PROCEDURE: *Prosecution must prove appellant and wife had custody and control of drugs - Whether evidence of common intention between appellant and wife - Section 34 Penal Code - Presumption under s. 37(d) of the Dangerous Drugs Act 1952 does not arise unless there was evidence of custody or control of drugs - Mere knowledge is not sufficient to constitute possession - If more than one inference which can reasonably be drawn from a set of facts the inference most favourable to accused should be adopted.*

CRIMINAL PROCEDURE: *Statement or information by appellant that led to discovery of drugs - Whether admissible under s. 27 of Evidence Act 1950 - Appellant merely said there were some drugs outside - Whether he merely had knowledge of the presence of the drugs or had actually hidden the drugs in the kitchen - Two incriminating statements made by accused.*

The appellant was charged and convicted by the Kuala Lumpur High Court on a charge of trafficking in 109.81 grammes of heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised Act 234/80).

On 27 March 1985, a police party raided an unnumbered house, occupied by several people, including the appellant, his wife and some relatives. On searching the appellant's room in the presence of the appellant and his wife, the police recovered a red plastic bag which was confirmed to contain 8.50 grammes of heroin. On further questioning, by which time he had already been arrested and handcuffed the appellant led the police to the kitchen, where the appellant retrieved a tin container and another package. Both were found to contain 13.06 grammes of heroin and 88.25 grammes of heroin respectively.

Both the wife and the appellant were charged jointly under s. 39B(1)(a) of the Dangerous Drugs Act 1952. Later, the charge against the appellant's wife was withdrawn. The prosecution relied on the legal presumption under s. 37(d) of the Act. The learned Judge held that the appellant had care and custody of the drugs. Relying on the presumption under the Act, he accordingly held that the appellant was in possession of the drugs. The appellant was accordingly convicted and sentenced to death.

Held:

[1] The learned Judge failed to address his mind to the fact that the drugs were recovered from two different locations in the house and the different circumstances which led to the recovery of the drugs at these two locations.

[2] The prosecution had failed to establish that the appellant had custody or control of the drugs and therefore the presumption under s. 37(d) of the Act did not arise. Accordingly, the appellant cannot be deemed to have possession of the drugs and deemed to have known the nature of the drugs found in the room.

[3] As regards the recovery of the drugs in the kitchen, the prosecution has failed to prove possession and knowledge of the nature of the drugs on the part of the appellant.

[4] In the circumstances it is not safe for the Court to conclude that the appellant had either custody or control of the drugs. The appeal was allowed, the conviction quashed and the sentence was set aside. The appellant was accordingly acquitted and discharged.

[Appeal allowed. Conviction quashed and sentence set aside. Appellant was acquitted and discharged.]

[**Bahasa Malaysia** Translation of Headnote]

PROSEDUR JENAYAH: *Dadah berbahaya - Anggapan pemilikan dan pengetahuan - Pemeliharaan dan jagaan terhadap dadah - Dadah tersebut telah dijumpai di dua lokasi yang berasingan - Hakim perbicaraan gagal mempertimbangkan keadaan yang membawa kepada penemuan dadah tersebut di dua lokasi yang berlainan.*

PROSEDUR JENAYAH: *Pihak pendakwa dikehendaki membukti perayu dan isteri mempunyai pemilikan dan kawalan terhadap dadah - Sama ada terdapat niat bersama di antara suami dan isteri - s. 34 Kanun Jenayah - Anggapan di bawah s. 37(d) Akta Dadah Berbahaya 1952 tidak timbul kecuali terdapat bukti pemilikan atau kawalan dadah - Hanya pengetahuan sahaja tidak mencukupi untuk menetapkan pemilikan - Di mana beberapa inferensi boleh dibuat dari sebilangan fakta, inferensi yang paling berfaedah kepada si tertuduh harus diberi.*

PROSEDUR JENAYAH: *Pernyataan atau maklumat perayu membawa kepada penemuan dadah - Sama ada boleh terima di bawah s. 27 Akta Keterangan 1950 - Perayu hanya menyebut bahawa terdapat dadah di luar - Sama ada ia hanya mempunyai pengetahuan terhadap dadah tersebut atau sebenarnya telah menyembunyikan dadah tersebut di dalam bilik dapur - Dua pernyataan inkriminasi dibuat oleh tertuduh.*

Perayu telah didakwa dan disabit oleh Mahkamah Tinggi Kuala Lumpur di atas tuduhan mengedar 109.81 gram heroin di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952.

Pada 27 Mac 1985, satu pasukan polis telah menyerbu sebuah rumah yang tidak bernombor yang didiami oleh perayu, isteri perayu dan beberapa orang saudara mara lain. Dalam penggeledahan bilik perayu dengan kehadiran perayu dan isterinya polis telah menjumpai beg plastik merah yang setelah diperiksa disahkan mengandungi 8.50 gram heroin. Setelah penyoalan selanjutnya, perayu yang ketika itu telah ditangkap dan digari, membawa pihak polis ke dapur di mana ia mengeluarkan sebuah bekas tin dan sebuah lagi bungkusan. Kedua-duanya disahkan masing-masing mengandungi 13.06 gram dan 88.25 gram heroin.

Perayu dan isterinya telah didakwa di bawah s. 39B(1)(a), Akta Dadah Berbahaya 1952. Tetapi dakwaan terhadap isteri perayu telah ditarik balik. Pihak pendakwa bergantung sepenuhnya ke atas anggapan mengedar di bawah s. 37(d). Hakim perbicaraan yang arif telah memutuskan bahawa perayu memiliki dadah tersebut. Oleh yang demikian, perayu telah disabit dan dijatuhkan hukuman mati.

Diputuskan:

[1] Hakim perbicaraan Yang Arif telah gagal mengambil kira fakta yang menunjukkan bahawa dadah tersebut telah dijumpai di dua lokasi yang berlainan dan juga terhadap keadaan yang berbeza yang membawa kepada rampasan dadah di kedua lokasi ini.

[2] Pihak pendakwa telah gagal membuktikan bahawa perayu mempunyai jagaan atau kawalan terhadap dadah itu dan oleh itu anggapan di bawah s. 37(d) Akta tersebut tidak timbul. Oleh sebab itu, perayu tidak boleh dianggap memiliki dadah itu ataupun mengetahui tentang sifat-sifat dadah yang dijumpai di dalam bilik.

[3] Berhubung dengan dadah yang ditemui di dapur, pihak pendakwa gagal membuktikan bahawa perayu memiliki dadah tersebut ataupun mengetahui tentang sifat-sifat dadah tersebut.

[4] Dalam keadaan yang sedemikian, tidaklah wajar bagi Mahkamah untuk memutuskan bahawa perayu mempunyai jagaan atau kawalan terhadap dadah tersebut. Oleh yang demikian, perayu dibebaskan serta dilepaskan.

[Rayuan dibenarkan. Sabitan dibatalkan dan hukuman diketepikan. Perayu dibebaskan serta dilepaskan.]

Cases referred to:

Leow Nghee Lim v. Reg [1956] 22 MLJ 28 ***(foll)***
Shamsuddin bin Hassan & Anor. v. PP [1991] 1 CLJ (Rep) 428 ***(foll)***
PP v. Choo Chang Teik & Teoh Bee Siang [1991] 1 CLJ (Rep) 54 ***(foll)***
PP v. Lai Ah Bee [1974] 2 MLJ 74 ***(foll)***
PP v. Khoo Boo Hock & Anor. [1990] 2 CLJ (Rep) 716 ***(cit)***
Low Geok Yeok v. PP [1982] CLJ (Rep) 539 ***(foll)***
Wai Chan Leong v. PP [1989] 1 CLJ (Rep) 171 ***(cit)***
Tai Chai Keh v. PP [1948 - 9] MLJ Supp 105 ***(cit)***
Yee Ya Mang v. PP [1972] 1 MLJ 120 ***(foll)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(d), (g), 39B(1)(a), 39(B)(2)
Evidence Act 1950, s. 27
Penal Code, s. 34

For the appellant - Gurbachan Singh;M/s. Bachan & Kartar
For the respondent - Mohd. Yusof bin Hj. Zainal Abiden, DPP

JUDGMENT

Anuar Zainal Abidin J:

The Facts

The appellant was tried and convicted in the High Court at Kuala Lumpur on a charge of trafficking in dangerous drugs, to wit, 109.81 grammes of heroin, in contravention of s.39B(1)(a) of the Dangerous Drugs Act 1952 (Revised Act 234/80), punishable under s. 39B(2) of the same act, as amended by Act A553/83.

The facts of the case, as established during the trial, are as follows. On 27 March 1985, at about 12.10 a.m., acting on information received, a party of police officers led by Inspector Yusoff (PW3) raided an unnumbered house at Kampung Pandan Jaya, Ampang, Selangor. The house was occupied by several people, including the appellant, his wife (Tham Lai Ngor) and some relatives.

On arrival at the house, PW3 identified himself and rounded up all the occupants of the house in the hall. There were ten persons altogether, seven females and three males. PW3 informed them of his desire to search their rooms, and then proceeded accordingly, accompanied by one Inspector Lai Joo Wah.

Upon entering the appellant's room, PW3 carried out the search in the presence of the appellant and the wife and recovered a red plastic bag lying on the floor of the room. The bag contained a package wrapped with newspapers, and in it were discovered seven small plastic packets containing substances suspected to be dangerous drugs. Upon their being sent to the Chemist for analysis, the substances were confirmed to contain 8.50 grammes of heroin.

Following the discovery of the substances, PW3 questioned the appellant, whereupon the appellant informed PW3 that there were some more drugs outside. According to PW3, the appellant then led him to the kitchen, which was situated at the rear portion of the house. By this time, PW3 said that the appellant had already been arrested and handcuffed.

Further evidence by PW3 showed that he was handed by the appellant a tin container and another package which the appellant had recovered from under a stove in the kitchen. The container and the package were later confirmed by the Chemist to contain 13.06 grammes of heroin and 88.25 grammes of heroin, respectively.

The above, in essence, formed the basis of the prosecution's case against the appellant.

Following the arrest and discovery of the drugs, the appellant and his wife were charged jointly under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). However, on 21 May 1986, the charge against the appellant's wife was withdrawn.

Presumption under s. 37(d)

It is evident at the trial that the prosecution relied on the legal presumption provided under s. 37(d) of the Act. Under s. 37(d) of the Act, a person found to have custody or control of any dangerous drugs shall be deemed to be in possession and know the nature of such drugs until the contrary is proved.

On the evidence adduced before him, the learned trial Judge held that the appellant had care and custody of the drugs. Replying on the said presumption under the Act, he accordingly held that the appellant was in possession of the drugs. Regrettably, the learned Judge failed to address his mind to the fact that the drugs were recovered from two different locations in the house. Nowhere in his judgment did he consider the different circumstances which led to the recovery of the drugs at these two locations.

With respect to the learned Judge, we feel that as a matter of prudence the evidence ought to have been considered separately. The circumstances surrounding the recovery of the drugs in the common kitchen differ from those which led to the recovery of the drugs in the appellant's room.

With regard to the recovery of the drugs in the appellant's room (which the appellant shared with his wife), the prosecution must show that either the appellant alone had possession of the drugs or that he and his wife had joint possession, the prosecution has to prove that the appellant and his wife had a common intention. The crucial question is: has the prosecution been able to prove common intention?

The evidence before the Court shows that the appellant and his wife were the only occupants of the room in question. Although the room was not locked during the day, it was kept locked at night and was therefore not accessible at night to any other person except the appellant and his wife. At the material time when the drugs were recovered, only the appellant and his wife had access to the room. The prosecution therefore has to establish beyond reasonable doubt that the appellant alone had possession of the drugs or that both he and his wife had joint possession of the drugs.

In our opinion, the evidence before the Court was not sufficient to establish that the appellant alone had the drugs in his custody or under his control. The drugs were found lying on the floor. They were not hidden. It is not probable to suggest that the appellant **alone** had custody or control of the drugs since there were two people occupying the room at the material time. The mere fact that the drugs were found in the room does not necessarily prove that the appellant had **sole custody or control.** It is not conclusive evidence; it is neutral in nature. At best, the evidence before the Court shows either the appellant or his wife could have custody or control of the drugs.

In *Leow Nghee Lim v. Reg* [1956] 22 MLJ 28, 29, Taylor J said:

> There is no presumption of custody. The presumption is from custody. Unless custody was established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and the power of control over them, not amounting to possession.

The prosecution must therefore prove that the appellant and his wife had custody or control of the drugs. To do this, the prosecution must establish a common intention between the appellant and his wife. The case against the appellant cannot succeed unless there is evidence of such common intention or evidence from which such common intention can properly be inferred.

Common Intention

In *Shamsuddin bin Hassan & Anor. v. PP* [1991] 1 CLJ (Rep) 428 this Court held that it is essential that there should be evidence of common intention. In that case, two persons (a husband and wife) were jointly charged with trafficking in 1,614.1 grammes of cannabis, an offence under s. 39B(1)(a) of the Act, read with s. 34 of the Penal Code. They were both convicted by the High Court at Ipoh. On appeal, this Court held that the learned trial Judge failed to consider the provisions of s. 34 of the Penal Code in respect of common intention and allowed the appeal. In that case, the prosecution's evidence was that while the accused were travelling in a car driven by the husband they were chased by the police. In the chase, the police said they saw a bundle being thrown out of the left window of the car. The police picked up the bundle, which was a batek cloth stuffed with cannabis.

Allowing the appeal, the Court said:

> There was no evidence as to who actually threw out the bundle but it was sought to be inferred it must be the wife appellant as the bundle was thrown out of the left side of the car, the car having only two doors and the wife appellant sitting next to the husband appellant who was driving the car ... At best the evidence showed that one of the appellants must have had custody or control of the drugs to throw it out of the car. But who?

Further along in this judgment , the Court said:

> The mere fact of a bundle being thrown out of the car is not evidence of common intention or evidence from which such common intention can properly be inferred ...
>
> It would have been different if only one of the appellants was in the car at the material time or one of them was actually seen throwing the bundle out of the car.

It was accordingly held that there was no evidence of custody or control of the drugs to raise the presumption under s. 37(d) of the Act that the appellants were in possession of the drugs and the further presumption that they must have known that the drugs were cannabis. Unless this can be proved, the presumption under s. 37(d) of the Act that the appellant were trafficking in drugs did not arise.

In our view the same principles apply here.

In *PP v. Choo Chang Teik & Teoh Bee Siang* [1991] 1 CLJ (Rep) 54 this Court accepted the appellants' story that they had no knowledge of the drugs found in the bag as sufficient to rebut the presumption under the Act. In that case, the two appellants were charged with trafficking in dangerous drugs under s. 39B of the Act. They were arrested as a result of a police raid carried on a house No. 12 Jalan Senohong Satu, Taman Cantik, Cheras, Kuala Lumpur. The police had been maintaining surveillance on the house when at 6 p.m. they saw two cars stop at the house. They saw the first appellant in one car and the second appellant with one other person, Tan Soon Hock, in the other car. As Tan Soon Hock and the second appellant entered the house, the police saw the first appellant taking out something heavy from the boot of his car and carrying it into the house.

At about 6.15 p.m. the police party raided the house. They had to force their way in by breaking the front door with a crowbar. The first appellant was walking towards the kitchen. On seeing the police, he ran away but was arrested some distance away from the house. Tan Soon Hock and the second appellant were in the master bedroom when the police came. The second appellant jumped out of the window but was also arrested some distance away from the house. Tan Soon Hock was arrested in the master bedroom. The police later recovered a travelling bag which contained heroin concealed in the bathroom attached to the master bedroom.

All three of them were jointly charged with the crime. Tan Soon Hock unfortunately died in prison pending trial.

The learned Judge held that both the appellants had under s. 37(g) of the Act, knowledge of the nature of the concealed drugs. The appellants in their defence gave a story that the second appellant and Tan Soon Hock had rented the house on 4 November 1985 to be used as an office. On 5 November 1985 Tan Soon Hock took the keys to put something in the house. On 6 November 1985, the first appellant, second appellant and Tan Soon Hock were moving into the house to clean the house. While they were in the house, the police party raided the house and they were arrested. In delivering the judgment of this Court, it was held that:

> On the evidence as a whole the defence raised by the appellants were reasonable and probable and sufficient enough to rebut the presumption under the Act ...
>
> On proper assessment of this evidence it is probable that both the appellants had no knowledge of the offending drugs in the travelling bag recovered from the toilet of the master bedroom. The evidence shows that Tan Soon Hock was alone in the room when he was arrested.

In the case before us the fact that the prosecution had earlier charged both the appellant and his wife jointly, gave rise to an inference that there was common intention. However, after more than a year, when the charge against the wife was withdrawn, there is no longer any evidence of common intention. Without the evidence of common intention, the appellant alone cannot be said to have had custody or control of the drugs. The evidence as it were is insufficient to establish whether the appellant had custody or control of the drugs or merely had knowledge of the presence of such drugs in the room.

Knowledge

It is trite law that mere knowledge is not sufficient to constitute possession: see *PP v. Lai Ah Bee* [1974] 2 MLJ 74, followed by Edgar Joseph Jr J in *PP v. Khoo Boo Hock & Anor.* [1990] 2 CLJ (Rep) 716, 721.

It is merely one of the ingredients of possession. Without the evidence of custody or control, the presumption of possession under s. 37(d) of the Act cannot arise.

In the present case, we are of the view that the prosecution has failed to establish that the appellant had custody or control of the drugs and therefore the presumption under s. 37(d) did not arise. The appellant cannot be deemed to have known the nature of the drugs. With respect, we are of the opinion that the prosecution has failed to prove its case against the appellant in respect of the drugs found in the room.

With regard to the discovery of the drugs in the kitchen, the evidence of the prosecution is that the drugs were discovered as a result of information given to the police by the appellant. In answer to some questions by PW3, the appellant had answered that "there were more drugs outside", and this resulted in the discovery of the drugs in the kitchen. While here it was alleged that the accused had taken the drugs from beneath the kitchen table and handed them over to the police.

The appellant refuted the prosecution's version. He denied that he himself took the drugs from beneath the kitchen table. The learned trial Judge, however, found as fact than the appellant did give the information to the police which led to the discovery of the drugs. With respect, we have no reason to disagree with the learned Judge's finding of fact. We agree with his conclusion that the appellant had given the information after he was questioned by the police and then led the police to the kitchen where the drugs were discovered.

In evidence, it is not disputed that the kitchen was a common kitchen; it was accessible to all the occupants of the house. It was not enclosed or locked. Besides the appellant, the other occupants of the house had free and unrestricted access to the kitchen. It is clear from the evidence that the appellant was not the only person who could have known of the existence of the drugs under the kitchen table. The other occupants too could similarly have knowledge of the existence of the drugs there.

In *Low Geok Yeok v. Public Prosecutor* [1982] CLJ (Rep) 539, the appellant was charged and convicted for trafficking in dangerous drugs under s. 39B(1)(a) of the Act. He was originally charged with his wife, but the wife was acquitted and discharged at the close of the case for the prosecution. Allowing his appeal Gunn Chit Tuan J (as he then was) held:

> There was no evidence that the appellant was in exclusive occupation of the kitchen where the stoves were found and therefore he could not be held to be the occupier of it ...

> The prosecution also did not prove who was in custody or control of those stoves containing the dangerous drug in question and it was not even able to prove who was in possession of the drug in question as the presumption under s. 37(d) of the Dangerous Drugs Ordinance 1952 could not be invoked.

In order to found a conviction, the prosecution must establish not only that the appellant had knowledge of the existence of the drugs but that he also had exclusive custody or control of them. The evidence in this case, however, after telling PW3 that "there were more drugs outside" (the appellant's actual words) the appellant had led the police to the kitchen and then took out the drugs from beneath the kitchen table.

Under s. 27 of the Evidence Act 1950, a statement or information or so much of the information that led to the discovery of the object is admissible. Therefore the statement or information by the appellant that led to the discovery of the drugs in the kitchen is admissible under this provision of the Evidence Act.

In *Wai Chan Leong v. PP* [1989] 1 CLJ (Rep) 171, Gunn Chit Tuan SCJ said (at p. 175) that:

> (It) must be borne in mind that for s. 27 of the Evidence Act to apply, the information must be such as has caused the discovery of a fact. In other words the fact must be the consequence and the information the cause of its discovery. Moreover the information must relate distinctly to the fact discovered ...

However, in the context of this case, it is imperative that the Court considers with the utmost care the nature of the information given by the appellant that led to the discovery of the drugs. The evidence before the Court is that the police asked the appellant "where he kept some more drugs". The appellant did not respond directly to this question but merely said that there were some more drugs outside. He did not say that he **had kept** some more drugs outside. Nor did he say that he **had** some more drugs outside. His reply did not pin him down to anything incriminating beyond the fact that he "knew" of the existence of the drugs outside.

In our view, it is not possible to say whether he merely had knowledge of the presence of the drugs or that he had actually hidden the drugs in the kitchen. He could have given the information to the police merely to assist the latter in recovering the drugs, which actually belong to someone else. In *PP v. Khoo Boo Hock & Anor.* [1990] 2 CLJ (Rep) 716, 721, Edgar Joseph Jr J expressed similar sentiments in a case also involving trafficking in drugs. In that case, based on the evidence adduced at the trial, there was a doubt as to whether the accused had mere knowledge of the drugs or whether he had actually hidden them. The learned Judge held, in the circumstances of the case, that:

> (It) would not be possible to say whether they merely had knowledge of the presence of the offending exhibits under the floor boards of the store room, and so were merely assisting the police in their recovery by indicating someone else's guilty.

In the present appeal, it is possible that the appellant merely had knowledge of the drugs in the kitchen, and nothing more beyond that. In view of this doubt, it might be pertinent to refer to *Tai Chai Keh v. PP* [1948 - 9] MLJ Supp 105 in which Spenser Wilkinson J held (at p. 108) that:

> Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of the opinion that the inference most favourable to the accused should be adopted.

In *Yee Ya Mang v. PP* [1972] 1 MLJ 120, Sharma J said (at p. 121 of the report) that:

> ... (The) mere production of such articles by itself would not necessarily prove his possession. It would at the most show that he had knowledge where the articles were kept or concealed ... In the absence of any incriminating statement made by the accused leading to the discovery of the articles, their production alone ...cannot be sufficient to establish the accused's possession. It may at the most show his knowledge that the articles were concealed there.

In the circumstances, we are of the opinion that it is not safe for the Court to conclude that the appellant had either custody or control of the drugs. In the absence of evidence of custody or control, the presumption under s. 37(d) of the Act does not arise: see *PP v. Lai Ah Bee* [1974] 2 MLJ 74. We are of the opinion, therefore, that as regards the recovery of the drugs in the kitchen, the prosecution has failed to prove possession and knowledge of the nature of the drugs on the part of the appellant.

For the above reasons, we allow the appeal, quash the conviction and set aside the sentence. The appellant is accordingly acquitted and discharged.

Also found at [1992] 4 CLJ 1791